COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

June 1, 2018

Docket No. VS-15-203

RANDY A. BRITTON, Petitioner

v.

DEPARTMENT OF VETERANS' SERVICES, Respondent

DECISION ON MOTION FOR RECONSIDERATION

Appearance for the Petitioners:

Randy A. Britton, CPA, *pro se*
10 Drummer Boy Way
Lexington, MA 02420-1220

Appearance for Implied Intervenor
Lexington/Bedford Veterans' Services District

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Appearance for the Respondent:

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General Counsel
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Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

Following the Decision dismissing the petitioner's M.G.L. c. 115 veterans' benefits appeal for lack of prosecution, and as a discovery-related sanction based upon an adverse inference that documents he has refused to produce since late 2015 would have shown his financial ineligibility for Chapter 115 benefits, the petitioner moved for reconsideration, pursuant to 801 C.M.R. § 1.01(7)(l) . Reconsideration is denied. The petitioner's motion identifies neither a clerical or mechanical error in the decision requiring correction, nor a significant factor that the DALA Administrative Magistrate overlooked in deciding the appeal, and presents, therefore, no ground for reconsidering the Decision.

Introduction

At issue in this appeal was whether petitioner Randy A. Britton was financially eligible to receive M.G.L. c. 115 state veterans' benefits, a form of needs-based public assistance, between September and December 2014. What Mr. Britton's income was from all sources during that time, and how his income was to be determined, had baffled both the local Veterans' Services officer (VSO) and the Massachusetts Department of Veterans' Services (DVS) in view of multiple income streams to the Britton household, including his own sole proprietorship income and his wife's income from a Massachusetts limited liability company, all of which was deposited in late 2014 into a bank account of which Mr. Britton was either the sole owner or co-owner with his wife. On April 11, 2018, I issued a Decision dismissing this M.G.L. c. 115 state veterans' benefits appeal. The dismissal was, in part, a discovery sanction. Based upon Mr. Britton's refusal to produce income-related documents that DVS had requested, including the Brittons' 2014 federal tax return, I drew an adverse inference that these documents would have shown his financial ineligibility for Chapter 115 benefits between September and December 2014. Dismissal was also based upon lack of

prosecution—Mr. Britton's failure to file a motion for a protective order as to the documents he refused to produce, as I had ordered him to do, and his failure to respond to subsequent motions by DVS to compel production of the documents it had requested, and, subsequently, to dismiss the appeal for lack of prosecution. In view of this dismissal, the Decision also ordered the termination of Chapter 115 benefits payments to Mr. Britton effective immediately, and confirmed his placement into "refund status" for the full amount of benefits he was paid between September and December 2014, an amount that would be recouped by offset against any subsequent Chapter 115 benefits payments for which he was eligible.

Mr. Britton moved for reconsideration of the Decision on April 23, 2018. The Lexington/Bedford Veterans' Services District (the District) filed an opposition to the motion on May 2, 2018, and DVS filed an opposition on May 11, 2018. Mr. Britton filed a reply to the District and DVS on May 22, 2018.

For the reasons stated below, the motion for reconsideration is denied.

Background

a. Termination of Chapter 115 Benefits and Placement into Refund Status

Mr. Britton, a United States Army veteran and certified public accountant with a law degree, began receiving a monthly $1,673 state veterans' benefit payment in August 2014 pursuant to M.G.L. c. 115 and the Massachusetts Department of Veterans' Services (DVS) Regulations, 108 C.M.R. § 1.00 *et seq*. The level of benefits he received was apparently for a married veteran living

with a spouse. At some point afterward, the local veterans' services officer (VSO) learned that deposits to a bank account belonging to Mr. Britton and/or his wife exceeded his monthly Chapter 115 benefit payment and asked about them. Mr. Britton told the VSO that his wife was self-employed and had income from Medical Practice Solutions, LLC (the LLC), a limited liability company of which she was the sole manager, and that the LLC passed its profits and expenses through to her. The VSO concluded that Mrs. Britton's income, including the LLC's revenue, placed Mr. Britton over the income limits for the Chapter 115 benefits he was receiving, and that Mrs. Britton's income was not reported until January 2015.

On February 3, 2015, the Lexington/Bedford Veterans' Services District, the local veterans' services agency administering the Chapter 115 benefits program in Mr. Britton's home town, issued a notice of action terminating his Chapter 115 benefits payments based upon Mr. Britton's failure to report his wife's "[t]otal revenue generated" during the four month period in question, *citing* 108 C.M.R. § 6.01, which states that a person applying for or receiving Chapter 115 benefits must report "all income received from all other sources," s*ee* 108 C.M.R. § 6.01(2). Both the local veterans' services agency and the Massachusetts Department of Veterans' Services (DVS) rely upon this information to determine whether a Chapter 115 benefits applicant or recipient is qualified financially to receive this form of public assistance. Based upon Mr. Britton's failure to report all income received from all other sources, the District treated the Chapter 115 benefits he had received between September and December 2014 as an overpayment, and, in addition to terminating benefits payments to him, it also placed Mr. Britton into "refund status" for the benefits he was paid between September and December 2014 ($6,692) less a small amount of benefits for which he qualified in

October 2015 when Mrs. Britton's income was smaller ($153), for a total "refund amount" of $6,519. Per standard practice in the state veterans' benefits program, the refund amount would be recouped by withholding from Mr. Britton any future M.G.L. c. 115 benefits for which he qualified until the amount was fully repaid.

b. Appeal to DVS, and DVS Decision

Mr. Britton appealed the District's decision to DVS on February 19, 2015, as the DVS regulations allowed him to do. *See* 108 C.M.R. § 8.07(3). He asserted that the local veterans' service officer had incorrectly attributed the LLC's entire revenue for September-December 2014 as income to his wife without first deducting the expenses the LLC had incurred in generating revenue during that period. Left unexplained was how, or why, Mrs. Britton's deposits of her income from the LLC into the checking account between September and December 2014 had become deposits of the LLC's gross revenue. The appeal did not identify Mrs. Britton as a member of the LLC entitled to a pass-through of LLC profits and losses. Nor did it state whether the Brittons had treated Mrs. Britton's LLC-related income as if it were partnership income, and the LLC's expenses as offsets to that income—for example, in their 2014 federal tax return.[1]

None of this would be clarified during the DVS appeal or by that agency's decision. During the DVS hearing, Mr. Britton offered two income statements he prepared in January 2015 and signed

[1]/ The April 11, 2018 Decision discusses the pass-through of a Massachusetts LLC's profits and losses to a member of the company, and the relevance of both the LLC's operating agreement and the tax returns of both the LLC and a member in determining whether the member may properly claim LLC expenses as offsets to LLC income she received. *See* Decision at 11-18.)

as a CPA, which stated that "Medical Practice Solutions, LLC" passed its income through to Mrs. Britton, and that Mr. Britton had a sole proprietorship from which he had an income ("Medical Practice Specialists"). Both income statements appeared to show the combined income that the Brittons had during the second half of 2014 from the LLC and the sole proprietorship. They differed as to how each categorized the expenses it showed. One of them (DVS Hrg. Exh. 2) categorized the LLC's expenses by transaction date. The other (DVS Hrg. Exh. 6) matched these expenses, whenever they were incurred, to the LLC's revenue during a particular month. Neither statement included supporting backup documents. Both statements treated Mrs. Britton's LLC-related income and expenses, and Mr. Britton's sole proprietorship income and expenses, as a single income and expense stream. The types of expenses shown on both statements appear to have been the same, including expenses for "car and truck," "communications," home office, insurance, office supplies, taxes, "transportation" and "utilities." It was unclear from the statements whether these expenses included any losses that were passed-through to Mrs. Britton from the LLC and, if so, what the amounts of those losses were.

Following a hearing, DVS issued a decision on May 14, 2015 vacating the termination of Mr. Britton's M.G.L. c. 115 benefits payments and his placement into refund status, and remanded the matter to the District to determine Mr. Britton's self-employment income between September and December 2014, after identifying and deducting legitimate business-related expenses, and determining, thus, whether he was financially eligible for Chapter 115 benefits during that time.

c. DALA Appeal, and its Dismissal

Mr. Britton timely challenged the DVS Decision on May 14, 2015, pursuant to 108 C.M.R. § 8.07(3), by commencing this appeal to the Division of Administrative Law Appeals (DALA). He claimed that DVS should have restored his M.G.L. c. 115 benefits payments and vacated his placement into refund status for any of the benefits he received in late 2014, rather than ordering that the District recompute his income for that period or "going forward." In the alternative, he claimed that DVS had erred in not directing that the District offset the LLC's revenue by any revenue-generating expenses the LLC had incurred. Based upon the expenses he claimed (which, per his two income statements were for both the LLC and Mr. Britton's sole proprietorship), Mr. Britton asserted that he and his wife had no self-employment income during the four months in question because, when related expenses were netted off against revenue, there was a net monthly loss between July and December, 2014, and that there was, as a result, no basis for terminating his benefits and placing him into refund status based upon financial ineligibility. Once again, Mr. Britton did not identify his wife as a member of the LLC, and nor did he identify the document(s), if any, that provided for the pass-through of the LLC's profits and losses to her and allowed her to offset the LLC's expenses in generating revenue against her LLC-related income.

I held a prehearing conference with the parties on August 5, 2015. In late September 2015, Mr. Britton moved to add a claim that his wife's LLC-related income belonged to her alone and was therefore not countable in determining his financial eligibility for Chapter 115 benefits, and stated that he perceived no material factual issue as to this claim and would be moving for summary

decision on it. DVS opposed the motion, asserting that it had no information allowing it to determine what portion of the Brittons' self-employment income was his and what portion belonged to his wife, and that the two income statements Mr. Britton had used during the earlier DVS hearing did not show this breakout. On October 15, 2015, I issued an order treating Mr. Britton's motion to add the claim as one for summary decision on the claim as well, and treating DVS's opposition as a motion for leave to conduct discovery it needed in order to oppose Mr. Britton's summary decision motion, particularly as to his income in late 2014 and whether Mrs. Britton's LLC-related income during that time belonged solely to her. The discovery was to include information amplifying the two income statements Mr. Britton had prepared for the earlier DVS hearing. I also scheduled a conference with the parties for November 5, 2015 to discuss the timing and scope of this discovery.

Prior to the conference, DVS sent Mr. Britton a request for production of documents related to the self-employment income and expenses shown by his two income statements. The documents that DVS requested from him included the 2014 tax returns he and his wife filed, and that were filed on behalf of the entities from which he and his wife had income or as to which they had sustained losses. Mr. Britton refused to produce any of these documents, asserting that they were irrelevant or, as to the tax returns, that they were privileged and protected from disclosure. During the conference and in an order I issued afterward, on November 5, 2015, I ordered that Mr. Britton file a motion for a protective order stating all of the grounds he asserted in declining document production, with supporting authority. That motion was due on December 11, 2015. *See Order Following Status Conference* (Nov. 9, 2015).

Mr. Britton did not file a motion for a protective order, and moved for summary decision instead. He asserted that there was no genuine factual issue to be resolved, and that the income statements he presented at the DVS hearing sufficed to establish that he had no self-employment income between September and December 2014. He also asserted that his wife's income from the LLC belonged to her alone, and should not be counted in determining whether he was financially eligible for Chapter 115 benefits. DVS countered that it needed the documents it requested to frame a response to Mr. Britton's summary decision motion.

Mr. Britton sought, next, an extension of his time to respond to DVS's document request, but his time to do so had already expired, and the motion therefore required no action. *See* 801 C.M.R. § 1.01(4)(e), and Decision at 35, 39-40.) DVS did not oppose the motion, which worked an indulgence on its part in refraining from moving to compel disclosure during the additional 45-day document production time Mr. Britton had requested. That additional time came and went, early in 2016, and Mr. Britton has since filed no motion for a protective order, produced none of the documents DVS requested (in its initial request, or in a second document request it sent to Mr. Britton in December 2015), and filed no response to DVS's subsequent motions to compel document production or dismiss this appeal for lack of prosecution. (Decision at 41-42.)

The April 11, 2018 Decision was based upon Mr. Britton's persisting refusal to produce the documents DVS requested, and its consequences. His refusal to produce documents not only impeded the agency's ability to defend against his claims and his summary decision motion, but also precluded the determination of Mr. Britton's actual income between September and December, 2015, including whether the LLC's profits and losses were passed through to his wife alone or to him as

well, and whether he had any legitimate business expenses to offset against any of the entities from which he had self-employment income during the time in question. It also impeded the ability of both DVS and the District to determine Mr. Britton's income from all sources and whether he was financially qualified for M.G.L. c. 115 benefits, as they must do under both the statute and the DVS regulations. In those circumstances, I drew an adverse inference that the documents Mr. Britton refused to produce (with the exception of the Britton's 2014 Massachusetts tax return, which was protected by privilege from disclosure, *see* Decision at 56-57), would have shown his financial ineligibility for Chapter 115 benefits payments between September and December 2014. Following the Appeals Court's recent guidance in *Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd.*, Memorandum and Order Pursuant to Rule 1:28, 92 Mass. App. Ct. 1128, __ N.E. 3d __ , 2018 WL 911501 (2018) (*see* decision at 47-48), I dismissed this appeal in part as a sanction for Mr. Britton's persisting refusal to produce the requested documents and the adverse inference I drew from that conduct. (Decision at 60-66.) Dismissal was also based upon lack of prosecution—Mr. Britton's failure to file a motion for a protective order as to the documents he refused to produce, as I had ordered him to do, and his failure to respond to subsequent motions by DVS to compel production of the documents it had requested, and, subsequently, to dismiss the appeal for lack of prosecution. In view of this outcome, I also ordered the termination of Chapter 115 benefits payments to Mr. Britton effective immediately, and confirmed his placement into "refund status" for the full amount of benefits he was paid between September and December 2014 ($6,692), which would be recouped by offset against any subsequent Chapter 115 benefits payments for which he was eligible.

d. Motion for Reconsideration

In addition to stating each party's right of appeal to the Superior Court and/or the Governor's Council, the April 11, 2018 Decision also advised each party that it could file a motion to reconsider this decision, pursuant to 801 C.M.R. § 1.01(7)(l), in order to "correct a clerical or mechanical error in the decision or a significant factor that [DALA or the Administrative Magistrate] may have overlooked in deciding the case." The Decision stated (at 69) that:

> A motion for reconsideration pursuant to 801 C.M.R. § 1.01(7)(l) is not an opportunity to reargue matters already decided, for advancing arguments that could or should have been raised earlier, or for attempting to cure belatedly the conduct that precipitated this Decision (for example, by filing a motion for a protective order, or oppositions to the motion to compel production and motion to dismiss, that should have been filed and served earlier, or by producing the documents thus far withheld), and doing any of these things invites denial of the requested reconsideration outright, even without awaiting opposing papers.

Mr. Britton filed a motion for reconsideration of the Decision on April 23, 2018. He asks that I vacate the Decision and issue, instead, a summary decision in his favor "based on matters overlooked, including but not limited to DVS General Counsel's misconduct, innocent or not, that passes mere negligent misrepresentations and approaches fraud." (Mot. for reconsid. at 1.) DVS and the District each filed an opposition to the motion for reconsideration.

Discussion

Mr. Britton's motion identifies no clerical or mechanical error in the Decision. In asserting allegedly significant factors that the Decision overlooked, he reiterates arguments regarding his wife's income made more than two years ago, yet again without producing any of the supporting

documents he has withheld throughout this proceeding, all of which could and should have been made in a timely motion for a protective order that he never filed despite being ordered to do so. The motion also makes clear that Mr. Britton stands fast upon his longstanding refusal to produce any documents that DVS requested of him and his insistence that the agency (and, ultimately, this forum) has no right to examine any of them. In so doing, Mr. Britton's motion for reconsideration defies the Decision's explicit warning regarding the scope and purpose of a reconsideration motion. The motion presents, therefore, no ground for reconsidering the Decision.

I review the individual grounds Mr. Britton asserts in support of his motion.[2]

1. Lack of need for LLC-related information via document request

a. Information supplied adequately by caselaw

Mr. Britton asserts, first, that his wife was the sole member of the LLC, the LLC's tax liability passed through to her as its sole member, and the nature of the LLC and Mrs. Britton's relationship to it was "well documented" in caselaw that one could find on Westlaw, *citing Medical Practice Solutions, LLC v. Comm't*, 132 T.C. 125 (2009), *aff'd sub nom. Britton v. Shulman*, 2010 WL 3565790 (1st Cir. 2010), *cert. denied sub nom. Britton v. Comm't*, 563 U.S. 1034 (2011). (Mot. for reconsid. at 1-2.) The assertion appears intended to address my findings and conclusions in the

[2]/ In doing so, I set aside the personal invective that infects the motion (for example, the assertion that DVS General Counsel "repeatedly duped" the Administrative Magistrate into believing that the discovery his agency sought was necessary or required before it could respond to Mr. Britton's 2015 summary decision motion. (Mot. for reconsid. (Apr. 23, 2018) at 10.) This is not the first instance of such conduct. *See, e.g.*, Decision at 21, n. 7 (noting that Mr. Britton's appeal to DVS was replete with invective against the local VSO).

Decision to the effect that because Mr. Britton had not introduced, and refused to produce, the LLC's operating agreement or federal tax returns (the best evidence on point), the record did not show whether Mrs. Britton was a member of the LLC who was entitled to have that entity's profits and losses passed through to her, and whether this was done in 2014. These matters were related, in turn, to the material issue of whether, and to what extent, Mrs. Britton's LLC-related income belonged to Mr. Britton in 2014, and whether, and to what extent, Mr. Britton had offset his income with the LLC's LLC's revenue-generating expenses. These were determinations that neither the District nor DVS could resolve in determining Mr. Britton's income for Chapter 115 benefits eligibility purposes, and that DALA could not resolve on appeal, without the LLC's operating agreement, its membership list, and whichever tax returns for the period in question show whether LLC income was treated as partnership income, and who reported that income and claimed losses or deductions with respect to that income. (Decision at 17-18; as to the impact of Mr. Britton's failure to disclose these basic documents on the determination of his income and, therefore, of his financial eligibility for M.G.L. c. 115 benefits, *see* Decision at 60-63.)

The time period in question is September-December 2014. The basic documents comprising the best evidence of the LLC's nature, and whether Mrs. Britton was a member with the right to offset her income from the LLC with the LLC's income-generating expenses, are the LLC's operating agreement and membership list for September-December 2014, and, as far as how the Brittons treated Mrs. Britton's LLC income and the LLC's expenses in generating income, the 2014 federal tax returns for the LLC and for the Brittons. (*See* Decision at 17-18 and at 60-63.) In lieu of any of these documents, which Mr. Britton has persistently refused to produce, Mr. Britton offers

the tax court decision he cited. Although he does so primarily for the purpose of establishing that he is "a federally authorized tax practitioner" who represented his wife and the LLC before the Internal Revenue Service, he also does so, apparently, to show that the same information the basic documents would show as to Mrs. Britton's right to have the LLC's profits and losses passed through to her was readily available from the Tax Court decision, making unnecessary the discovery that DVS claimed to need.

Mr. Britton did not assert these arguments before I dismissed his appeal. He asserted, throughout both the DVS appeal and this one, that his wife was the "sole manager" of the LLC, not a member of the LLC, whether sole or otherwise.[3] Beyond this point, the Tax Court decision Mr. Britton cites addressed different issues than those raised here—whether, in allowing the LLC's unpaid employment taxes for quarters ended March 31 and June 30, 2006, the Internal Revenue Service could proceed against Mrs. Britton as the LLC's single member at the time, and whether the "check-the-box" IRS regulations under which it sought to collect employment taxes from her were valid, both of which the Tax Court answered in the affirmative. The Tax Court made no independent finding as to Mrs. Britton's membership in the LLC or her right to treat the entity's profits and losses as her own. Instead, the case was submitted to the Tax Court on stipulated facts, among them that in 2006, the LLC "was a single-member limited liability company registered in the

[3]/ *See* Final Dec. at 19 (Mr. Britton told the VSO in 2015 that his wife was the sole *manager* of the LLC); at 21 (no disclosure of Mrs. Britton's LLC *member* status during the DVS appeal), and at 34 (in the October 2015 order treating DVS's opposition to Mr. Britton's motion to add issues as one seeking discovery needed to oppose Mr. Britton's summary decision motion, I noted that one specific area of discovery inquiry was whether the LLC-related income to Mrs. Britton as sole *manager* of that entity was hers alone, based upon Mr. Britton's assertion of what her relationship to the LLC was.)

Commonwealth of Massachusetts," and that Mrs. Britton "was the sole member of the LLC during the periods in issue [those ending on March 31, 2006 and on June 30, 2006] and treated the LLC as her sole proprietorship on Schedule C, Profit or Loss From Business, of her Federal income tax return for 2006," and that she "did not elect to have the LLC treated as a corporation for Federal income tax purposes." These findings show that as to Mrs. Britton's relationship with the LLC, the Tax Court addressed a different time period (two tax quarters in 2006) than the time period at issue here (September-December 2014). Confined as it was to the facts extant as of 2006, the Tax Court decision cannot be read properly as having established these facts with respect to the last four months of 2014. Only the LLC's operating agreement and membership list as of September-December 2014 would confirm whether, during that time, she remained the LLC's sole member and (if it were indeed the case) had the right to have the LLC's profits and losses passed through to her, and only the Britton's 2014 federal tax return, together with the Schedule Cs it included, would show how she and Mr. Britton treated her income from the LLC and its revenue-generating expenses during that year. The Tax Court decision does not show, therefore, whether Mrs. Britton was the LLC's sole member in late 2014, whether she treated it as her sole proprietorship on her 2014 Federal tax return Schedule C, or even whether the Brittons' tax return for that year included a Schedule C for her LLC-related income and expenses.

Mr. Britton has still not clarified any of these points as to the period September-December 2014. Even if he were to clarify them, however, it would be too little, too late. His approach to clarifying these points has been, and is likely to remain, if not an outright refusal to disclose then a selective revelation of information regarding Mrs. Britton's LLC-related income and whether it was

hers alone. He persists, moreover, in refusing to confirm these points by disclosing the LLC's basic documents, including its operating agreement and membership list, and the Brittons' 2014 federal tax return. As the Decision pointed out (at 63-64), this discovery posture has left Mr. Britton in total control of the information that the District and DVS need to determine Mr. Britton's financial eligibility for public assistance in the form of Chapter115 benefits, and that this forum would need to make the same determination on appeal. These circumstances alone justified the adverse inference I drew against Mr. Britton for not disclosing the documents DVS requested—that they would have shown him to have been financially ineligible for Chapter 115 benefits in late 2014—as well as the dismissal sanction I ordered based upon the inference and Mr. Britton's failure to respond to DVS's motions to compel discovery and to dismiss. The Tax Court decision, which Mr. Britton cites for the first time and that addresses a different time period and different circumstances, does not present any information showing that the adverse inference I drew or the dismissal sanction I ordered were unjustified, or that I overlooked any significant factor in doing so. It presents no ground for reconsidering the Decision, therefore.

b. Insignificance of LLC-related income

Mr. Britton also argues that there was no need for discovery via document request relative to Mrs. Britton's LLC-related income, allegedly for these reasons: (1) the LLC "operated as a mere payment conduit for Carolyn Britton," who "did all the work" as a consultant for "Health Quarters" (one of the income sources listed on the income statements Mr. Britton prepared), whom she invoiced for her consulting services; (2) he "merely cashes Carolyn's checks, neither earning nor

charging a fee to cash her checks nor earning nor charging a percentage nor a fixed amount of her income," and therefore he has no income from the LLC; (3) even if he did, he would have paid his wife all of the revenue she collected as wages, leaving him entitled only to minimal compensation from acting as a payment conduit for cashing his wife's checks, and so he still would have had no income from the LLC. (Mot. for reconsid. at 2-3).

The argument is self-serving and is not supported by any documentation. Assuming that it had merit or relevance here, it could have been asserted, with supporting proof, long before the appeal was dismissed—for example during the DVS hearing, or earlier in this appeal, in a motion for a protective order that I had ordered him to file, and/or in an opposition to DVS's motion to dismiss. Instead, Mr. Britton insisted that the two income statements he prepared contained whatever DVS needed to know about his self-employment income and his wife's LLC-related income in late 2014, and he filed neither the required protective order motion nor an opposition to DVS's dismissal motion. Rather than showing a significant factor that the Decision overlooked, the "payment conduit" argument Mr. Britton advances now for the first time shows, at best, that he chose to withhold this allegedly significant information, from the day he commenced it to the day I dismissed it. Even if the new information is "significant," the rule governing motions for reconsideration does not recite "significant information withheld voluntarily" as a legitimate ground for this relief. It is not a ground for reconsidering the Decision, therefore.

2. Tax return disclosure constraints

Mr. Britton also asserts, in moving for reconsideration, that as a federally authorized tax

practitioner who represented both his wife and the LLC, he cannot voluntarily disclose their tax information. (Mot. for reconsid. at 2.) The point has been considered and decided, and the motion for reconsideration shows no material factor that the Decision overlooked. The Decision considered in detail whether any privilege shielded from disclosure the Brittons' 2014 tax returns, or the 2014 tax returns of the LLC and other businesses either of the Brittons operated. It found a privilege against disclosure as to the 2014 Massachusetts tax returns without an applicable exception, and, as to the 2014 federal tax returns, it found a qualified privilege that was overcome here by DVS's demonstrated need for the returns. (Decision at 53-63.)

In addition to attempting to relitigate the tax record disclosure issue, Mr. Britton's assertion regarding constraints on his voluntary disclosure of client tax returns is irrelevant. Voluntary tax return disclosure ceased to be an issue over two years ago, when, both before and during the November 5, 2015 status conference, Mr. Britton declined to produce any of the tax returns, and I ordered him to file a motion for a protective order stating each of his objections to disclosing the tax returns (and the other documents DVS requested), along with supporting authority. (*See* Final Dec. at 35-37). Tax record production then became an issue of production under compulsion; it was no longer about whether Mr. Britton could produce them voluntarily in his professional capacity (as the CPA who prepared them), but whether he was required to do so individually, as the person who had placed his finances in issue by applying for and receiving public benefits under M.G.L. c. 115. DVS requested production of the LLC's and the Brittons' 2014 tax returns formally, by request, in late 2015; Mr. Britton failed to moved for a protective order with respect to the request, as I ordered him to do twice in late 2015; and he also failed to respond to DVS's motion to compel production. (*Id.*;

see also Final Dec. at 41-42.) The consequence was not that Mr. Britton had to produce client tax returns and (as he believed would be the case) compromise his professional status as a CPA, but that an adverse inference would be drawn against him if he failed to do so—appropriately in the circumstances presented here—that the documents he refused to produce, including the Brittons' 2014 federal tax return would show his financial ineligibility for Chapter 115 benefits during the period September-December 2014. On this point, Mr. Britton's motion shows no significant factor that the Decision overlooked, and no error.

3. Failure to seek tax returns from MassDOR under M.G.L. c. 62C, §21(b)(10)

Somewhat related, because it concerns tax return production, is Mr. Britton's argument that DVS could have learned all it needed regarding the information in the Brittons' tax returns and the LLC's tax returns through the Massachusetts Department of Revenue (DOR) without taxpayer consent, pursuant to M.G.L. c. 62C, §21, and therefore had no need for the discovery it sought here. (*See* Mot. for reconsid. at 6-7)(analogizing the production of the tax records DVS sought here to a discovery request for public records, such as business certificates for sole proprietorships, that are readily available from public sources such as a town clerk or the Secretary of the Commonwealth with little effort). The conclusion I am invited to draw is that no adverse inference from his failure to produce tax returns was justified.

The argument is one that Mr. Britton could, and should, have asserted in a motion for a protective order, along with the grounds underlying his objections to document production, which he did not file despite my orders that he do so.

Had he done so, however, the argument would have failed for lack of supporting authority. The statute does not say what Mr. Britton says it does. The stated purpose of M.G.L. c. 62C is to prevent the disclosure of information contained in a return or document filed with the DOR Commissioner "to any person but the taxpayer or his representative." M.G.L. c. 62C, § 21(a). The prohibition is subject to specific exceptions recited at M.G.L. c. 62C, § 21(b). The opening clause of section 21(b) states that "[n]othing herein shall be construed to prevent . . ." This clause is followed by the exceptions allowing tax return disclosure by government agencies and officials, one of which is "the disclosure [by the Massachusetts Department of Revenue Commissioner] to . . . the commissioner of veterans' services of information necessary to ascertain or confirm the existence of fraud, abuse or improper payments to an applicant for or recipient of veterans' benefits." M.G.L. c. 62C, § 21(b)(10).

By its plain language, M.G.L. c. 62C, § 21(b)(10) allows the DOR Commissioner to provide this information to the DVS Commissioner without running afoul of Chapter 62C's prohibition against disclosure of tax return information to anyone other than the taxpayer and or his representative. Even if the DVS Commissioner requests tax returns or the information they contain, the non-disclosure exception that section 21(b)(1)) provides is for the turnover of "information" to DVS, not necessarily entire tax returns. For these reasons, and with my attention drawn to no contrary authority, I cannot read M.G.L. c. 62C, § 21(b)(10) as providing an alternative route by which DVS could have obtained the tax returns it requested from Mr. Britton, let alone one that DVS was required to exhaust before seeking tax returns via a document production request.

Nor can I read the plain language of M.G.L. c. 62C, § 21 generally, or of M.G.L. c. 62C, §

21(b)(10) specifically, as circumscribing the scope of discovery allowed under 801 C.M.R. § 1.01(8)(b), the section of the Standard Adjudicatory Rules of Practice and Procedure that governs discovery via document requests in proceedings such as this one. The statute expresses no such purpose. The scope of discovery allowed under 801 C.M.R. § 1.01(8)(b) remains, thus, as broad as its own language provides. That language allows the discovery of at least federal tax returns in an appeal such as this one, where they would be material to a veterans' benefits applicant's income from "all other sources" including self-employment, without the need to attempt their discovery initially from other sources.

801 C.M.R. § 1.01(8)(b) allows the service of a document request after the proceeding has been commenced without prior leave of the presiding officer. The rule requires only that the request "list with reasonable specificity items requested for inspection which are in the possession, custody or control" of the party from whom they are requested. The rule has been interpreted as allowing a party to request documents in the possession, custody or control of another party that relate to any of the material factual issues to be adjudicated and that have not been previously produced. *See, e.g., Volpe v. Massachusetts Teachers' Retirement System*, Docket No. CR-13-147, Decision and Order on Motion to Compel Production of Documents at 11-14 ("Volpe II")(Mass. Div. of Admin. Law App., May 24, 2017). The rule recites no requirement that the documents sought from a party be sought first from another source, and there is, as best as I can determine, no DALA decision reading this requirement into 801 C.M.R. § 1.01(8)(b).

The rule does not establish any different production standard applicable to the production of tax returns by request. However, to the extent that tax returns warrant special consideration because

privileges and statutory protections against their disclosure apply to them, limitations on discovery could be imposed via a protective order issued pursuant to 801 C.M.R. § 1.01(8)(a), if one were to be timely sought. Rule 8(a) allows the presiding officer to issue, with respect to document requests and other types of discovery, "any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense," including "limitations on the method, time, place and scope of discovery and provisions for protecting the secrecy of confidential information or documents."

As it is worded, this protective order provision allows the Administrative Magistrate flexibility to tailor a protective order to the circumstances presented. In appropriate circumstances, for example, 801 C.M.R. § 1.01(8)(a) might tolerate an order requiring that document production by a party follow an attempt to secure the documents, or the information they contain, from a different party, or a third party, who actually has their possession, custody or control. That requirement would be consistent with the "method, time, place and scope of discovery" limitations for which the rule provides. In keeping with those limitations, a party's obligation to produce its federal tax returns relative to a material issue involving its income and income sources (for example, in an appeal such as this one) might be deferred if that party no longer had a copy of its returns, the returns or the information they contained could be obtained from a third party (such as a taxing authority or even the CPA who prepared them, assuming the taxpayer signed an authorization for their release), and a reasonable time was needed for the party whose tax returns were sought to make a reasonable effort to obtain copies of the returns from the third party. That approach differs markedly, however, from reading into 801 C.M.R. § 1.01(8)(b) a requirement that this alternate

avenue of discovery be exhausted by the party seeking the documents before it may request them from another party.

Another reason for declining to read this requirement into the rule is that doing so would be inconsistent with Massachusetts civil discovery practice regarding document production under Mass. R. Civ. P. Rule 34. Although Rule 34 does not govern discovery in an adjudicatory proceeding such as this one, it is relevant law to be consulted in crafting discovery limitations that the Standard Adjudicatory Rules do not themselves specify. 801 C.M.R. § 1.01(7)(a)1 provides that "[a]n Agency or Party may by motion request the Presiding Officer to issue any order or take any action not inconsistent with law or 801 CMR 1.00.") The "law" with which an order limiting discovery must not be inconsistent includes analogous provisions of the Massachusetts Rules of Civil Procedure. In other circumstances where the Standard Rules do not supply procedural detail, DALA has applied standards used by the courts to resolve issues under analogous provisions of the Massachusetts, and Federal, Rules of Civil Procedure. *See Volpe v. Massachusetts Teachers' Retirement System*, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery ("Volpe I") at 8-10 (Mass. Div. of Admin. Law App., May 11, 2017).

Rule 34 allows a party to serve upon any other party, without leave of court, a request for production of "designated documents . . . which are in the possession, custody or control of the party upon whom the request is served." Mass. R. Civ. P. Rule 34(a). The request must specify the "items to be inspected" and "describe them with reasonable particularity," as well as "a reasonable time, place and manner of making the inspection . . . ." Mass. R. Civ. P. Rule 34(b). As is true of 801 C.M.R. § 1.01(8)(a), Rule 34 does not require the exhaustion of alternative possible means of

obtaining documents, such as tax returns, before a document request may be served by one party upon another.

Discovery caselaw under Rule 34 is mostly fact-specific, but several principles guide the application of the rule to the facts presented. Several of these principles would have been sensibly applied here had Mr. Britton, *as taxpayer*, asserted that he did not have any of the tax returns DVS requested: (1) discovery may be had of material evidence (including documents) in another party's possession or control; (2) possession or control of this evidence, which includes the legal right to obtain the information it contains, makes it discoverable; and (3) even if the party from whom discovery is sought does not have actual possession or control of the evidence in question, it must make a good faith effort to obtain it if it has a legal right to obtain the information it contains. *See, e.g., Strom v. American Honda Motor Co., Inc.*, 423 Mass. 330, 667 N.E.2d 1137 (1996). These principles are not inconsistent with 801 C.M.R. § 1.01(8)(a). They also reflect current Massachusetts practice with respect to document production. For these reasons, the principles are applied appropriately here.

Mr. Britton asserted throughout this appeal, as he still does, that as a CPA he cannot disclosure voluntarily any of the 2014 tax returns he prepared in a professional capacity. The argument suggests that he had, and retains, custody of the tax returns DVS requested, or copies of them, in his capacity as the preparing CPA. However, as the co-taxpayer on the 2014 federal tax return, Mr. Britton had the right to the information they contained—the very right that M.G.L. c. 62C, § 21 was intended to protect from disclosure by DOR and other government officials subject to specific exceptions. He did not assert the contrary, and also did not deny having at least a copy of the

Brittons' 2014 federal tax return, along with any of the Schedule Cs it included for his wife's LLC income or losses, and for income or losses attributed to his sole proprietorship.

If Mr. Britton did not have the 2014 federal tax return, he was obliged to make a good-faith effort to obtain it from someone who did. In view of the many hats that Mr. Britton has worn throughout his Chapter 115 benefits proceedings—taxpayer, benefits recipient, certified public accountant, and self-represented litigant among them—this would have been, essentially, an assignment between two of his alter egos, from himself, in his capacity as the CPA who prepared the return, to himself as the co-taxpayer listed on the return. This would not have been a particularly burdensome transaction for him to have undertaken. Without question, it would have been a far more direct route toward avoiding the conflict he perceived in his capacity as CPA and producing the Brittons' 2014 federal tax return than would be commending DVS to seek the tax return from DOR in the first instance via a Commissioner-to-Commissioner request pursuant to M.G.L. c. 62C, § 21(b)(10). If Mr. Britton had filed a motion for a protective order and requested in it that I direct DVS to seek the tax return first from the Department of Revenue under Chapter 62C, I would have found this proposed relief unnecessary and burdensome, and one that did not comport with the proper regulation of the time, place and circumstances of document production under either the Standard Rules or the law with which an order imposing tailor-made discovery limitations must be consistent, including Mass. R. Civ. P. Rule 34.

Considering all of the factors discussed above, I conclude that DVS was not required to seek the Brittons' 2014 federal tax return from DOR, or the information it contained, via a Commissioner-to-Commissioner request under M.G.L. c. 62C, § 21(b)(10) before it could request that Mr. Britton

produce the return. DVS's decision to seek the Brittons' 2014 federal return, instead, via a document request to Mr. Britton was not evidence that the agency needed no such discovery and sought it only to preclude a summary decision in Mr. Britton's favor, as he asserts. Mr. Britton's arguments regarding tax return production present no ground for reconsidering the Decision, therefore.

4. Phantom order allowing unlimited time to produce documents

With respect to his December 11, 2015 motion to extend by 45 days his time to respond to DVS's original (October 2015) document request, Mr. Britton asserts his recollection that I allowed him an open-ended time to respond because he needed to take his sister to a cancer hospital. (Mot. for reconsid. at 8-9). I issued no such order. Mr. Britton's motion for a 45-day extension was filed after the November 5, 2015 status conference at which I directed him to produce documents and to file a motion for a protective order stating the grounds for not producing them, and after I confirmed that order in writing. The time for him to produce the documents that DVS had requested on October 30, 2015 had expired when Mr. Britton moved to extend his time to produce them, as had his time to move for an extension of that time. (Decision at 39-40.) [4] The fact that DVS did not object to the extension merely worked a voluntary indulgence by that agency of the additional 45 day response time Mr. Britton had requested.

Mr. Britton concedes in his motion for reconsideration that he had "not yet found my copy of that communication from Magistrate Silverstein," adding that when he "went to review the DALA

[4]/ The Decision gave the date of DVS's original document request as October 30, 2017, a scrivener's error that I now correct to October 30, 2015.

record looking for a file copy, it was not in the DALA record. Strange." (Mot. for reconsid. at 9.) As I had issued no such order, it is hardly "strange" that he could find no copy of it in the record. Moreover, nothing in the record suggests that not issuing such an order was "strange." Mr. Britton requested no open-ended extension of his time to respond to DVS's document request when he filed his request for a 45-day extension, and said nothing implying that he needed one. What he actually said in his December 11, 2015 motion for an extension of time about his need for additional time to produce documents was that he would be occupied in arguing his condominium parking rights-related appeal before the Supreme Judicial Court (discussed in the Decision at 40 n. 17), and that, in addition, he might "need to travel out of state to help my sister get to MD Anderson Medical Center in Houston, Texas" for a December 14, 2015 initial appointment she had there, to which he added "but my brother in Florida may be able to do it." The motion presented, therefore, neither a request nor a need for an open-ended time to produce documents.

That said, the 45-day extension Mr. Britton sought and that DVS had voluntarily indulged expired long before I issued the Decision, in fact well before DVS moved to compel production and then to dismiss for lack of prosecution. He filed no motion for a protective order, and he continues to assert that he has no obligation to produce any of the documents DVS requested. In this context, Mr. Britton's argument regarding an allegedly open-ended extension of his time to produce documents would be academic if it were not entirely fanciful. It identifies, thus, no significant factor the Decision overlooked and no ground for reconsidering it.

5. Other alleged grounds for reconsidering the Decision

Several other arguments Mr. Britton raises in his motion for reconsideration also show no ground for reconsidering the Decision. One of these arguments is that DVS counsel knew Mrs. Britton's income from the LLC was not income to Mr. Britton, and therefore DVS had no need for the income documentation he sought by discovery, and this discovery was sought in order to avoid a summary decision adverse to DVS (Mot. for reconsid. at 4-5.) This argument does little more than attempt to relitigate Mr. Britton's insistence, throughout both the DVS and DALA appeals, that he provided all the information about his income that the District, DVS or DALA needed, as well as all income-related documents required of him by the DVS regulations to both DVS and the local VSO.

Mr. Britton was entitled to his opinion on this point, but his opinion was not the final word on what documents he was required to produce or whether and, if so, when, he needed to produce them. It was not conclusive as to whether he was required to respond to DVS's document requests or file a motion for a protective order stating all of his objections to production, with supporting authority. The orders requiring that he do so were conclusive as to that requirement. He elected to produce nothing requested of him and file no motion for a protective order. The adverse inference drawn against him subsequently—that the documents he refused to produce would have shown that he was not financially eligible for M.G.L. c. 115 benefits between September and December 2014—was justified in the circumstances. So, too, was dismissal based upon the adverse inference and his lack of prosecution (including failure to respond to DVS's motion to compel production and its subsequent motion to dismiss), and, as well, the termination of Chapter 115 benefits payments to

him and his placement into refund status for the full amount of benefits paid to him during this time period effective, immediately. There was no significant factor overlooked, and no error.

Disposition

Mr. Britton's motion for reconsideration shows neither a "clerical or mechanical error in the Order of Dismissal" requiring correction nor "a significant factor" that the DALA Magistrate "may have overlooked" in deciding the case, the grounds for reconsideration specified by 801 C.M.R. § 1.01(7)(l). The motion for reconsideration is therefore denied.

SO ORDERED.

Notice of Rights of Further Review and Appeal

The parties are hereby advised that:

(1) Pursuant to M.G.L. c. 115, § 2, further review of the Decision issued by the Division of Administrative Law Appeals in this proceeding (the April 11, 2018 Decision - Order of Dismissal, as to which reconsideration is hereby denied) may be had by any party upon application made to the Governor and Council within ten days after receipt of this decision on the petitioner's motion for reconsideration;

(2) The April 11, 2018 Decision of the Division of Administrative Law Appeals, or the Decision of the Governor and Council if an application for further review by the Governor and Council is made, is subject to judicial review in accordance with the provisions of M.G.L. c. 30A, § 14; and

(3) Any action or proceeding for such judicial review must be (a) commenced within 30 days of receipt of this decision on the petitioner's motion for reconsideration, or within 30 days of receipt of the Decision of the Governor and Council if an application for further review by the Governor and Council is made; and (b) filed with the Superior Court Department of the Trial Court.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: June 1, 2018